



# Texas Medical Board

MAILING ADDRESS: P.O. BOX 2018 • AUSTIN TX 78768-2018  
PHONE: (512) 305-7044

April 9, 2018

Ken Levine, Director  
Sunset Advisory Commission  
P.O. Box 13066  
Austin, TX 78711-3066

Dear Mr. Levine:

Thank you for the opportunity to respond to the Sunset Staff Report on the Texas Medical Board (Board). It is important to reiterate the Board's appreciation of the 2016 Sunset staff report which concluded that the agency generally is a solid model for licensure and enforcement. The original report also concluded that there is no bias for or against any practitioner. This finding is important given the Board is continuously caught between practitioners claiming its actions are too harsh on licensees and complainants claiming the Board is too lenient and is protecting practitioners.

The Board's understanding of the scope of the current review is that the recommendations are limited to those items adopted by the prior Commission but not otherwise addressed in the prior legislative session. This response addresses the recurring recommendations, implementation status of adopted recommendations, and addresses a few new issues.

## **Support for Recommendations**

In the Sunset Staff Summary there are three clear recommendations. First, the Board should enter a Memorandum of Understanding (MOU) with the Texas Physician Health Program (PHP). TMB agrees with this recommendation. An MOU was drafted in the past year; however, prior to the MOU being finalized PHP was selected to be subject of the Board's annual internal audit. Since PHP is being audited the Board determined it was prudent to delay any MOU until the audit was completed in the next few months.

Second, the Board should develop a risk-based approach to Office-Based Anesthesia inspections. In response to this recommendation, Board staff is currently drafting new rules. Board staff has consulted with practitioners and in April-May 2018 will be utilizing a new inspection process aimed at reducing the burden on practitioners while maintaining patient safety. The result of this process will help in the on-going rule writing process to better focus Board resources.

Finally, it is recommended Texas join the Interstate Medical Licensure Compact. The Board would also suggest consideration of other alternatives for expedited licensure processes. The Board agrees that the need to bring more physicians into Texas is paramount for our citizens, and agrees with any method acceptable to the legislature to facilitate that goal.

In addition to these three primary issues, the Board supports the remaining recommendations not adopted in the prior legislative session including the authorization to offer a non-disciplinary remedial plan to a physician every five years and the establishment of a “radiologist assistant” license type for advanced-level medical radiologic technologists. The Board would also suggest consideration of other unlicensed or non-certified health care providers be subject to Board oversight via supervision and delegation.

In regard to the recommendation for disciplinary panels hearing standard of care issues to consider whether a licensee was practicing complementary and alternative medicine, it is worth clarifying that currently both the panel and licensee are notified in advance of a hearing if the matter involves complementary and alternative medicine and overlaps with the Board’s corresponding rules.

### **Implementation of Management Actions and Recommendations**

Since summer 2017, the Board has been working to implement the 25 recommendations and five management actions adopted last session and has had numerous rulemaking sessions with stakeholders to draft rules over the past several months.

The board has implemented all five management actions previously adopted including publishing rules related to: 1) risk-based criteria to evaluate if a medical practice should be inspected related to prescribing activities; and 2) providing both a licensing exemption for out-of-state sports team physicians in Texas for 21 days or less and expediting licensing for traveling team physicians in Texas for more than 21 days.

The Board has also enhanced information for both consumers and licensees on its website. In March 2018, the Board adopted a new website linking policy to address external links posted on the TMB website including links to continuing medical education (CME) providers. Lastly, the Board has published in its newsletter CME courses available to practitioners on a variety of public health and medical practice topics such as opioid prescribing, tick-borne diseases including Lyme Disease, and sexual boundary issues.

For Sunset recommendations and legislative provisions adopted last session, the Board has published rules regarding:

1. use of opioid antagonists, and received an opinion from the OAG on the scope of persons authorized to administer these agents;
2. redaction of expert physician panelist information, other than the reviewer’s area of specialty, for expert reports used in standard of care cases;
3. removing the limitation on the number of times an applicant can take the Board’s jurisprudence exam; and
4. eliminated dual registry requirements for radiological practitioners.

In relation to prescribing issues and HB 2561, the Board has met with the Pharmacy Board regarding the Prescription Monitoring Program, and the Board and licensees are receiving monthly email alerts regarding patients who may potentially be doctor-shopping. The Board is using these notices in conjunction with risk-based criteria to focus inspection and enforcement activity on potential high-risk prescribers. In addition, the Board and Office of the Attorney General (OAG) have developed a subpoena enforcement process for the Board’s administrative subpoenas.

## New Issues

There are four new issues the Board would like to bring forward. First, TMB believes consideration should be given to revising the Medical Practice Act [Tex. Occ. Code, Section 164.007(a-1)] to clarify the appeal and judicial review process of Findings of Fact and Conclusions of Law in a contested case proceeding. These are hearings held at the State Office of Administrative Hearings (SOAH) when a disciplinary case has not been resolved informally between the Board and a licensee. The current statute does not provide any guidance on the process and creates the potential for a single case to be subject to three or four redundant appeals to state district court.

Second, there is a need to clarify and extend indemnification for all board members for lawsuits brought against members in their personal capacity. The reason for this request is there appears to be a trend to sue board members in their individual capacity when they are appropriately carrying out their statutory duties as a gubernatorial appointee. This has a chilling effect on the willingness to serve. Indemnification gives an added layer of protection to appointees making serving more appealing.

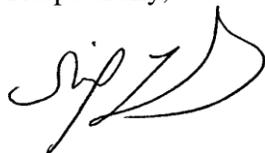
Third, eliminate the current statutory exemption that allows Advance Registered Nurse Practitioners (APRN) to own pain management clinics. The reason for this request is that in the face of the opioid crisis this exemption is a major loophole to the oversight and accountability of these important healthcare practitioners. An APRN cannot practice independently in Texas and must practice under the supervision and delegation of a physician. To allow ownership of clinics by APRNs creates an untenable situation in regard to supervision and delegation. The APRN can be the employer of physicians yet the physician-employee is supervising, and delegating to, the APRN-employer. Moreover, the physician-employee is responsible and liable for all the acts of the APRN-employer.

Fourth, is to consider an exemption to the current statutory limitation on the number of attempts a physician has for the national physician licensing exam, the United States Medical Licensing Examination (USLME), for out-of-state physicians applying for Texas licensure. The reason for this request is to help address the physician shortage through differentiation between applicants for Texas licensure who are just entering the practice versus a long-time experienced practitioner with an established history of competence and safe practice in another state. Many practitioners may want to be licensed in Texas and have a long career without discipline or negative actions in another state, but they did not pass the USLME in the set number of times currently required for initial Texas licensure. This may be an alternative pathway to encourage otherwise qualified physicians to come to Texas. In that same vein, TMB eliminated the 10-year rule and Maintenance of Certification requirements for physician licensing consistent with SB 1148 passed last session.

On behalf of the Board members and staff, we thank you and your staff for a thorough and detailed review resulting in recommendations to improve the agency's regulatory efficiency and effectiveness while maintaining the mission of public protection.

We look forward to working with you in the upcoming legislative session.

Respectfully,



Sherif Zaafran, M.D.  
President, Texas Medical Board



Scott M. Freshour, J.D.  
Interim Executive Director

cc: Members, Texas Medical Board  
Alison Jones, M.D., Presiding Officer, Texas Physician Health Program